

APPEAL NO. 030186
FILED MARCH 7, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 2, 2003. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter. The appellant (carrier) appealed, arguing that the claimant's underemployment during the qualifying period was not a direct result of his impairment but rather his own personal choice. The carrier also argued that the claimant presented no specific evidence about the costs involved in his self-employment. The appeal file did not contain a response from the claimant.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102 (Rule 130.102). At issue in this case is both the direct result and the good faith effort requirements.

The parties stipulated to the various jurisdictional elements, including that the qualifying period for the first quarter was from June 29 through September 27, 2002, and that the first quarter was from October 11, 2002, through January 9, 2003. The claimant contended that he met the criteria for SIBs by his self-employment as a clerk in the store, which sold educational materials, that he and his wife had established.

The parties stipulated that the claimant had no earnings or was underemployed during the qualifying period for the first quarter. The carrier contended that the claimant's underemployment was not a direct result of his impairment but rather his own personal choice to begin a new business venture and only pay himself limited wages. The claimant was employed by a courier service at the time of his injury. It was undisputed that the compensable injury resulted in two spinal surgeries. The claimant testified that his job required daily lifting of 2 to 150 pounds. In evidence was a medical record, which stated that the claimant was released with permanent restrictions of lifting no more than 25 pounds frequently or 50 pounds occasionally. The Appeals Panel has long held that the direct result requirement may be met by showing a serious injury with long-lasting effects, which precludes a return to the preinjury employment. Texas Workers' Compensation Commission Appeal No. 011443, decided August 1, 2001. The hearing officer found that the claimant has returned to work earning less than 80% of his average weekly wage as a direct result of his impairment. The hearing officer's determination on this point is supported by sufficient evidence.

The carrier argues that the claimant failed to present any evidence as to the amount he pays to lease space, costs of inventory, sales figures, business plans, etc.

Rule 130.101(1)(D), which sets out information that self-employed individuals should include with the Application for [SIBs] (TWCC-52), does not require creation of documents where none may exist. The rule suggests documentation that may (not must) be attached if in existence, "such as" business plans or sales tax registration. A person in a business that did not make taxable sales would not have a sales tax permit and therefore nothing to attach to the TWCC-52. Also, not every business plan is reduced to a formal writing, especially in the case of sole proprietorship, and the hearing officer could accept testimony that assists in determining whether self-employment efforts will meet the good faith effort to search for employment test. In this case, the hearing officer did not commit error in crediting testimony and the advertisements in evidence regarding the claimant's self-employment.

The hearing officer also found that the claimant attempted in good faith to obtain employment commensurate with his ability to work. In this regard, Rule 130.102(d)(1) provides that a good faith effort has been made if the employee "has returned to work in a position which is relatively equal to the injured employee's ability to work." Clearly, the claimant's business to this point has not earned him any wages or profit; however, that is not necessarily the controlling factor, particularly in the initial stages. Clearly, a carrier is not expected to subsidize a business venture and it cannot be used as a subterfuge for a good faith effort to obtain employment. Texas Workers' Compensation Commission Appeal No. 980548, decided May 1, 1998. It would have been desirable for the claimant to submit evidence regarding the financial aspects of his business such as cost of lease space, inventory, sales figures, profit and loss statements, and his business plan.

Whether a good faith effort is shown is basically a question of fact for the hearing officer, and cases tend to become very fact specific in self-employment situations. Texas Workers' Compensation Commission Appeal No. 982820, decided January 11, 1999. The hearing officer apparently found the claimant's testimony credible regarding his endeavors to establish a successful business, that his efforts were commensurate with his ability to work, and that he met the requirements for SIBs with his self-employment efforts, at least as of the qualifying period for the first quarter. Essentially, this was a factual determination for the hearing officer to make. Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997. While different inferences may find some support in the evidence, we cannot conclude that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

**TREVA DURHAM
1000 HERITAGE CENTER CIRCLE
ROUND ROCK, TEXAS 78664.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge